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21 *Attorneys for Defendants*
22 *C. R. Bard, Inc. and*
23 *Bard Peripheral Vascular, Inc.*

14
15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 IN RE: Bard IVC Filters Products Liability MDL NO. 15-02641-PHX-DGC
18 Litigation

19 This Document Relates to:

20 JOHNISHA WRIGHT,

21 Plaintiff,

22 v.

23 C. R. BARD, INC., a New Jersey
24 Corporation; AND BARD PERIPHERAL
25 VASCULAR INC., an Arizona
Corporation,

26 Defendants.

27 Case No. CV-15-03466-PHX-DGC

28 **DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S COMPLAINT FOR
FAILURE TO COMPLY WITH
AMENDED CASE MANAGEMENT
ORDER NO. 5**

1 Pursuant to Fed. R. Civ. P. 12(b) Defendants C. R. Bard, Inc. and Bard Peripheral
 2 Vascular, Inc. ("Bard") respectfully move this Court to dismiss Plaintiff's Complaint for
 3 failure to comply with the terms of Amended Case Management Order No. 5 pertaining to
 4 timely service of Plaintiff Profile Forms ("PPF").

5 **I. PROCEDURAL HISTORY**

6 On October 12, 2016, Plaintiff filed a Second Amended Short Form Complaint in
 7 MDL 2641, *In Re: Bard IVC Filters Products Liability Litigation*, and subsequently, served
 8 Bard with a copy of the Summons and Complaint the same day. *See* Waiver Transmittal
 9 Email from Plaintiff's counsel attached hereto as Exhibit A. On March 3, 2016, this Court
 10 entered Case Management Order No. 5 [Doc. 927] (the "Order") which ordered, in part:

11 In cases that have been filed in, removed to or transferred to this
 12 MDL on or after the date of this Order, each plaintiff shall submit
 13 a completed PPF to defendants within 60 days of filing the
 14 complaint

15 *Id.* at 1:18-19. The Order further made clear that:

16 If a plaintiff does not submit a PPF within the time specified in
 17 this Order, defendants shall mail an overdue letter by e-mail and
 18 U.S. mail to Plaintiffs' Co-Lead Counsel and the plaintiffs'
 19 individual representative counsel, stating that defendants may
 20 move to dismiss that plaintiff's case within 20 days of receipt of
 21 the letter. If no PPF is received within those 20 additional days,
 22 defendants may move immediately to dismiss that plaintiff's case.

23 *Id.* at 2:17-22.

24 Plaintiff's PPF was due to be served within 60 days of filing the complaint, to wit:
 25 December 11, 2016, but Bard was not served with Plaintiff's PPF by that date. Subsequently,
 26 on December 21, 2016, February 3, 2017, May 23, 2017, and September 18, 2017, counsel
 27 for Bard sent Plaintiff's Co-Lead Counsel and individual representative counsel an overdue
 28 letter via email and U.S. Mail notifying Plaintiff's counsel of the overdue PPF, and Bard's
 right under the Order to move to dismiss the Complaint for failure to comply with the
 protocol set forth by the Order. *See* emails and letters from Bard's counsel, attached as

Exhibit B. To date, Bard still has not received a PPF from the plaintiff in response to its overdue letter.

II. ARGUMENT AND CITATION TO AUTHORITY

The Ninth Circuit has ruled that at least one federal district court sitting over an MDL action did not abuse its discretion in dismissing certain plaintiff's complaints for failure to comply with case management orders related to service of plaintiff fact sheets. *In re: Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1232-34 (9th Cir. 2006).

Here, the Court entered an Order governing the timely service of PPFs, and providing a clear protocol for sending and responding to PPF overdue (and deficiency) letters. Plaintiff failed to serve a PPF within 60 days of the filing of the complaint, failed to serve a PPF within 20 days of receiving the first overdue letter, and has subsequently ignored three (3) additional requests to serve a PPF upon Bard; thereby, delaying the discovery process and forcing Bard to incur the cost of filing this Motion. Accordingly, Plaintiff's Complaint may be dismissed by the Court pursuant to the terms of Case Management Order No. 5 [Doc. 927].

WHEREFORE, Bard respectfully requests that this Court enter an Order dismissing Plaintiff's Complaint for the foregoing reasons. For the Court's convenience, a proposed order is attached as Exhibit C.

This 26th day of September, 2017.

s/Richard B. North, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Richard B. North, Jr.
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